82-663

No.

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In The Supreme Court of the United States

OCTOBER TERM, 1982

~~RASHID, ROLA & RITA KARAM, BY AND THROUGH THEIR FATHER AND NEXT BEST FRIEND, MAURICE R. KARAM AND~~ et al,
MAURICE R. KARAM, PETITIONERS,

v.

ALLSTATE INSURANCE COMPANY, et al
~~BUCKEYE UNION INSURANCE COMPANY AND MAURICE R. KARAM, ADMINISTRATOR OF THE ESTATE OF ROSE KARAM.~~

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF
THE STATE OF OHIO

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QUESTION PRESENTED

Whether the Supreme Court of the State of Ohio must be composed of at least six (6) elected justices under the Ohio Constitution in order to constitute a competent judicial tribunal in accordance with the due process guarantee of the United States Constitution.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Ohio (Appendix A, infra, 2a through 37a) is reported at 70 Ohio St.2d 227. The denial of the Motion for Rehearing (Appendix A, infra, 38a) is not reported. The Decision and Entry of the Court of Appeals for Franklin County, Ohio (Appendix B, infra, 39a through 49a) is not reported. The Decision and Entry of the Court of Common Pleas for Franklin County, Ohio (Appendix C, infra, 50a through 53a) is not reported.

JURISDICTION

The judgment of the Supreme Court of the State of Ohio (Appendix A, infra, 1a) was entered on June 23,

1982, and the Motion for Rehearing (Appendix A, infra, 38a) was denied on July 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257(3) in that petitioner is specially claiming the right of due process under the Constitution of the United States of America.

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions are set forth in Appendix D, infra, 54a and 55a.

STATEMENT

On February 16, 1982 Petitioners' cause was submitted to the Ohio Supreme Court for oral argument. At that time absent were Chief Justice Frank Celebrezze and Justice William Brown. In their stead sat Judge Stephenson, of

the Fourth Appellate District of Ohio, for Chief Justice Celebrezze and Judge Victor of the Ninth Appellate District, for Justice William Brown. Neither of the absent Justices had disqualified themselves.

Petitioner, on July 6, 1982, filed a Motion for Rehearing contending that the Court as thus constituted was not a competent tribunal since the Ohio State Constitution, which is the sole source of authority in Ohio for judicial tribunals, allows for the substitution of only one of the justices who were elected to the Ohio State Supreme Court with a judge from the lower courts. This Motion for Rehearing was summarily denied without hearing or opinion on

July 19, 1982. Because the Motion for Rehearing was denied the specific federal question involved, that of the guarantee of due process of law, has not been able to be specifically addressed in the proceedings of State Courts. This constitutional right of due process, however, based on the holding of Glidden Co. v. Zdanok, 370 U.S. 530, 536, 82 S. Ct. 1459 1465 (1962), is being timely and properly raised.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari to the Supreme Court of the State of Ohio should be granted because the denial of the Motion for Rehearing of the Ohio State Supreme Court

conflicts with the holding of the federal courts, specifically Sas v. State of Maryland, 334 F.2d 506, 515 (1964), where it was held that:

> "With respect to state action repeated decisions of the Supreme Court have put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular mode or form of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard, before a competent tribunal are not interfered with. [Citing] Frank v. Mangum, 237 U.S. 309, 340 35 S. Ct. 582." [Emphasis Supplied].

Petitioners have been denied due process because their cause of action was not heard before a competent tribunal. The Ohio State Supreme Court as constituted was not a competent tribunal because it contained two

substitute judges rather than only one, as allowed by the Ohio Constitution. Before going further it is necessary to show that the justices whose constitutional authority to act is being challenged are "substitute" and not "de facto" judges.

In their most recent pronouncement on this subject the Ohio Supreme Court stated that a de facto judge is one who:

> "Enters upon and performs the duty of his office with the acquiescence of the people and the public authorities and has the reputation of being the officer [sic] he assumes to be and is dealt with as such" State v. Staten, 25 Ohio St.2d 107 (1971), point 3 of the syllabus of the court.

Although the above definition would seem to emcompass the two substitute judges, it is inapplicable for the very reason that they are substitute judges

and do not otherwise claim title to the office. In 15 Ohio Jurisprudence 3rd, CIVIL SERVANTS §303, it is stated that:

> "It is evident that two different persons cannot, at the same time, be in the actual occupation and exercise of an office for which one incumbent only is provided by law [citing Davies v. State, 11 OCC W.S. 209; State v. Corey, 2 O Dec. Rep. 669, aff'd. 16 OS 17; and Knorr v. Board of Education, 8 O Dec. Rep. 672]. Hence, if the officer de jure is occupying the office there is no room for an officer de facto."

In the instant case, there are de jure justices and thus there can be no de facto justices, only substitute justices. This conclusion is shared by Annot. 144 ALR 1207, at page 1214, where it states:

> "The necessities upon which the general rule that the title or authority of a de facto judge

> cannot be challenged by a litigant in litigation before him are not present . . . where one other than the regular judge presides, inasmuch as in such case, there is no profession of right to the particular judgship or authority to exercise the function thereof, except by special election or appointment. Accordingly, upon this theory, cases of special, substitute or pro term judges have been recognized as exceptions to the general rule . . . and objections to their authority may be made in the court in which the challenged judge sits . . . and, if overruled, maybe assigned as error upon appeal."

In 46 Am. Jur.2d JUDGES §261, it is stated that:

> "However, if the record affirmatively shows that the judge deciding the case was neither a de jure or de facto officer [but rather a substitute judge], a litigant adversely affected may object for the first time on appeal. A challenge on constitutional grounds to the authority of a substitute trial judge may be

raised for the first time on appeal." [Citing Glidden Co. v. Zdanok, 370 U.S. 530, 82 S. Ct. 1459 (1962).]

In Glidden, the authority of the judge was challenged for the first time in the U.S. Supreme Court. Because the challenge was on direct review and not by way of a collateral attack on the judgment there was no justification to apply the rule forbidding challenges to the authority of the judge which is founded:

> "[U]pon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it if adverse upon a technicality of which they were previously aware. . . . The alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants. . . . It should be examinable on direct review, where its

> consideration encounters none of the objections associated with the principle of res judicata, that there must be an end to litigation." Glidden, 370 U.S. at 536, 82 S. Ct. at 1465.

Therefore, the authority of these two justices may be challenged by Petitioner on appeal since the "alleged defect of authority here relates to basic constitutional protections designed in part for the benefit of litigants" Id. That substitute justices must be appointed in accordance with the source of all judicial authority, the Constitution, is a universally accepted legal principle.

In 21 Corpus Juris Secondum COURTS §120 (p. 180) it is stated:

"The constitution, as the dispenser of the sovereign power of a state, is the ultimate source of the judicial power of courts. To it all courts owe their existence and jurisdiction. Unless a court's authority emanates from the supreme power of the state, the court itselt is an absolute nullity, and all its proceedings are utterly void. No person can, in the absence of authority at law, create a court and preside over the same as judge; nor can any judge hold a court which is unconstitutional in its organization."

More specifically, in 48A Corpus Juris Secondum JUDGES §166 it states:

"In order for an individual to act as a special or substitute judge under the law, his selection must comply with the provisions of the law."

In 48A Corpus Juris Secondum JUDGES §170 it states:

"Where the selection of a special judge is not in accordance with law, there is no judge and the entire proceeding is a nullity."

In the instance case, the court before which Petitioners' claim was heard was not a competent tribunal and, therefore, their due process rights were violated because the court contained two substitute judges while the Ohio State Constitution only permits the appointment of a single substitute justice.

Article IV, Section 2, of the Ohio State Constitution provides:

> "[The] supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of the longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or

causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place instead of the absent judge. . . ." Emphasis supplied.

The plain language of Article IV, Section 2, provides that no more than one judge shall be replaced by an appellate judge during the hearing of a cause. The language of the section is singular. The nouns are singular. This construction is consistent with the demands of the democratic process whereby supreme court justices are elected by the general populous. They serve subject to removal through vote. Article IV, Section 2 represents a reasoned decision that permitting one appellate judge to sit in the stead of an absent justice serves judicial

effeciency. To permit more than one to sit usurps the democratic process which guarantees responsive government.

It is clear that in Ohio only one substitute justice may be constitutionally appointed. If more than one is appointed then the body is not a competent judicial tribunal as guaranteed by the due process clause of the United States Constitution. However, in Glidden, 370 U.S. at 536, 82 S. Ct. at 1465, the ability of the United States Supreme Court to consider the challenge to the judge's authority rested in part on their determination that "the challenge is based upon nonfrivolous constitutional grounds". In the instant case the alleged

violation of Petitioners' due process rights guaranteed by federal constitution is nonfrivolous, as shown by Ohio case law.

In Hilton v. State, ex rel Bell, 108 Ohio St. 233, 238 (1923) the Ohio State Supreme Court stated that "[n]ot only does the express language of the judicial article of the Constitution, but its entire spirit, breathe antagonism to an appointed judiciary". In State, ex rel Cherrington v. Hutsinpiller, 112 Ohio St. 468, 473 (1925), it was stated that a "power [the judicial power] so extraordinary and vital should not rest upon any less foundation than express grant or clear and necessary implication. . . ." Hutsinpiller, 112 Ohio St. at 475,

concluded that "[e]xcept, therefore, for the purpose of filling vacancies, as provided by law, there is no legal or constitutional power by which a judge may be appointed in this state." [Emphasis supplied].

In Ohio, the due process right to have a claim heard by a competent tribunal of elected justices is taken most seriously. It is manifest that Petitioners did not enjoy that right.

There is one Ohio case, State, ex rel Stanley v. Cook, 146 Ohio St. 348 (1946) in which two supreme court justices were replaced by two appellate court judges. Of course, this simple fact does not make the practice constitutional. Further, the case is

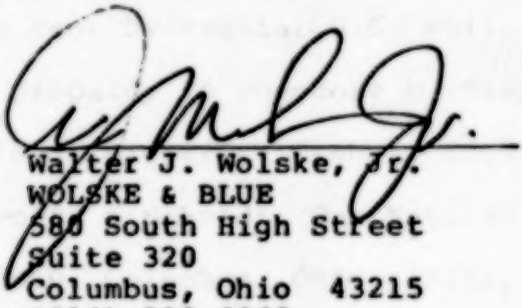
clearly distinguishable from the case at bar. First, the justices in that case had disqualified themselves. Thus, if the case was to be heard by a seven justice court without first holding an election the two justices had to be replaced with substitutes. In the case at bar, since the justices had not disqualified themselves, all that needed be done to have had the cause heard by the seven elected justices is to have waited until the reasons for the absence of the two justices ceased to exist, since illness, etc., is not permanent as is disqualification. Second, in Stanley, counsel for both parties agreed that the case could be heard by the court as

thus constituted with two substitute justices. In the case at bar, there was no such agreement and Petitioners objected to the competency of the court to act with two substitute justices at the earliest possible time, i.e., in their Motion for Rehearing. Stanley, in fact, supports the assertion that only one justice (absent disqualification) may constitutionally be replaced by a substitute. Why else would it have been necessary to obtain the consent of the parties to the action except to estop them from objecting on appeal?

In conclusion, then, the two justices were not de facto justices but were only substitute judges since the

offices were already filled with de jure justices. Because the justices are not de facto, their authority may be challenged on appeal. Even if this Court should decide that Petitioners' objections were not raised below (even though made at the earliest possible moment in their Motion for Rehearing), this is no bar to an appeal on this issue since Petitioners are alleging the violation of a basic constitutional right, that of due process. Petitioners' due process rights were violated because their case was not heard by a competent tribunal of elected justices since it contained more than one appointed substitute judge in violation of Article IV,

Section 2 of the Ohio State Constitution. Finally, Petitioners' claim is not frivolous given the degree of commitment to an elected judiciary in the State of Ohio.



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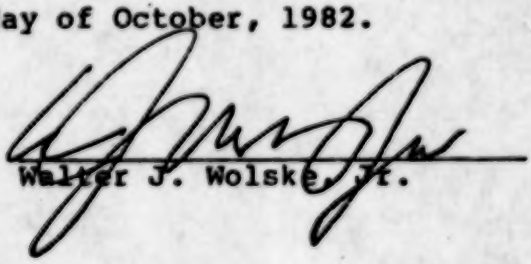
CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of this Court, that a true copy of the Petition for Writ of Certiorari to the Supreme Court of the State of Ohio was sent by regular U.S. mail, postage prepaid, to Theodore D. Sawyer and David J. Richards, Crabbe, Brown, Jones, Potts & Schmidt, One Nationwide Plaza, 2500, Columbus, Ohio 43215, this 14 day of October, 1982.



Walter J. Wolske, Jr.

AFFIDAVIT OF MAILING PROCESS

STATE OF OHIO:
COUNTY OF FRANKLIN, SS:

I, Walter J. Wolske, Jr., after first being duly sworn, deposes and states that to my knowledge the Petition of Writ of Certiorari to the Supreme Court of the State of Ohio was deposited in a United States Post Office with first-class postage prepaid and properly addressed to the Clerk of this Court on October 14, 1982 and that therefore this document should be deemed timely filed pursuant to Rule 28.2 of the United States Supreme Court Rules.

Walter J. Wolske, Jr.

Sworn to before me and subscribed in my presence this 14th day of October, 1982.

Notary Public

Gerald S. Lessenberry, Attorney At Law
NOTARY PUBLIC — STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

APPENDIX A

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO, 1982 TERM

City of Columbus. To Wit: June 23, 1982

Rashid Karam et al.,
Appellants,

vs.

Allstate Insurance Co. et al.,
Appellees.

No. 81-958

APPEAL FROM THE COURT OF APPEALS for FRANKLIN County

This cause, here on appeal from the Court of Appeals for FRANKLIN County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed for the reasons set forth in the opinion rendered herein.

and it appearing that there were reasonable grounds for this appeal, it

is ordered that penalty be assessed herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; and that a mandate be sent to the COMMON PLEAS COURT to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for FRANKLIN County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and the seal of the Court this _____ day of _____, 19___.

_____Clerk

_____Deputy

Statement of the Case

KARAM ET AL., APPELLANTS, v. ALLSTATE INSURANCE COMPANY, ET AL., APPELLEES.

[Cite as Karam v. Allstate Ins. Co. (1982), 70 Ohio St.2d 227.]

Negligence-Automobile accident-Suit by child against parent-Parent-child immunity applicable.

An unemancipated child may not recover in a tort action instituted against the administrator of the estate of the child's mother and her liability insurance company for personal injuries received by the child in an automobile accident alleged to be proximately caused by the negligent operation of an automobile, and which results in the mother's death. The immunity arising from the parent-child relationship shall be recognized even though the alleged negligenct parent has deceased. (Teramano v. Teramano, 6 Ohio St.2d 117, followed.)

(No. 81-958-Decided July 23, 1982.)

Appeal from the Court of Appeals for Franklin County.

On August 14, 1978, Rose Karam was operating a motor vehicle which was involved in an accident on Dublin Road, Franklin County, Ohio, with another motor vehicle. Rose Karam and other passengers in her vehicle were killed in the accident. Injured in the accident was Rashid Karam, Rola Karam, and Rita Karam, who were minor children of Rose Karam and her husband Maurice Karam and resided in their parents' home at the time of the accident.

On January 15, 1980, Maurice Karam, as father and next of kin of the three children, instituted suit in the Court of Common Pleas of Franklin County against himself as administrator of the estate of Rose Karam, the Allstate Insurance Company and the Buckeye Insurance Company seeking to recover damages on behalf of the children. The complaint averred the two insurance companies had issued contracts of liability insurance covering Rose Karam and that the proceeds of the insurance policies were not assets of the decedent's estate. Maurice Karam joined individually in the complaint seeking recovery for hospital and medical expenses and for loss of society, companionship, and future services of his children.

Opinion, per STEPHENSON, J.

On May 22, 1980, the court sustained a Civ. R. 12(B)(6) motion to dismiss filed by the insurance companies. On November 26, 1980, the court entered a summary judgment in favor of Maurice Karam as administrator of Rose Karam's estate.[1] Upon appeal to the Court of Appeals, the judgment was affirmed.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Wolske & Blue and Walter J. Wolske, Jr., for appellants.

Messrs. Crabbe, Brown, Jones, Potts & Schmidt, Mr. Theordore D. Sawyer and Mr. David J. Richards, for appellees.

STEPHENSON, J. This appeal requires us to determine the scope of the Ohio rule of parental immunity which bars

the recovery in a tort action by a child against its parent based upon personal injuries proximately caused by negligent conduct of the parent. Appellants, in their first proposition of law, do not argue for a total abrogation of the rule, but rather urge this court to hold the rule inapplicable where, as here, the parent alleged to be negligent is deceased and liability insurance proceeds alone would be the source for the payment of any judgment granted in favor of the child.

The rule that a parent is immune from liability in a tort action instituted against the parent by a child is universally recognized as one judicially created in Hewlett v. George (1891), 68 Miss. 703, 9 So. 885, and, unlike interspousal immunity, has no common law origin. The rationale in Hewlett for the rule is that such an action disturbs the domestic peace and harmony of the family and is contrary to public policy.

After its pronouncement in Hewlett, the rule, subject to certain exceptions, was adopted in practically all jurisdictions and represented to overwhelming weight of authority.[2] A

principal reason articulated in support of the rule, in addition to the family tranquility reason, was the danger of fraud and collusion by reason of the widespread existence of liability insurance. Sorensen v. Sorensen (1975), 369 Mass. 350, 339 N.E.2d 907; Guess v. Gulf Ins. Co. (1981), 96 N.M. 27, 627 P.2d 869; Streenz v. Streenz (1970, 106 Ariz. 86, 471 P.2d 282.

Additional reasons relied upon to support the rule were (1) depletion of the family exchequer, (2) the possibility of inheritance by the parent of the amount recovered in damages by the child, and (3) interference with parental care, discipline, and control. Trevarton v. Trevarton (1963), 151 Colo. 418, 378 P.2d 640; Borst v. Borst (1952), 41 Wash. 2d 642, 251 P.2d 149; 43 Harvard L. Rev. 1030, 1056.

In a growing number of jurisdictions the parental immunity rule has been in many recent cases reconsidered and abrogated, mostly in part,[3], upon the basis that the traditional

reasons relied upon to support the rule are no longer persuasive, particularly the domestic tranquility and collusion rationale.[4] See Annotation 41 A.L.R.3d 904, Liability of Parent

for injury to Unemancipated Child Caused by Parent's Negligence.

The issue of parental immunity was first before this court in Signs v. Signs (1952), 156 Ohio St. 566. In Signs, a seven-

year old child had instituted suit to recover for injuries suffered from the alleged negligence of a partnership, of which her father was a partner, in the maintenance and operation of a gasoline pump. After a review of the historical development of the rule, the court held that "[a] parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child." Unarticulated, but implicit in such syllabus language, is that the rule of paental immunity was in force in Ohio.

In Teramano v. Teramano (1966), 6 Ohio St.2d 117, the issue of parental immunity was again before this court. In Teramano, the plaintiff was an unemancipated child who was struck in the driveway of his home by an automobile operated by his father who it was alleged was operating his automobile at a high speed and under the influence of intoxicants. The court, in denying the right of recovery, and after concluding that the father's conduct was not intentional or malicious, held the following:

"1. A parent is immune from suit by his unemancipated minor child for tort unless facts of the case are sufficient to show abandonment of the parental relationship. (Signs v. Signs), 156 Ohio St. 566, explained.)

"2. A malicious intent to injure existing in the conduct of a parent toward his minor unemancipated child evidences abandonment of the parental relationship. Malicious intent to injure in such cases may be actual or implied.

"3. Where the petition filed by an unemancipated minor against his parent, seeking damages for personal injuries, alleges that the injuries were willfully inflicted but it becomes apparent upon the opening statement of plaintiff's counsel that the acts complained of were not done with a malicious intention to injure or were not such acts as would justify a presumption of malicious intent to injure, a verdict should be directed for defendant."

The Court of Appeals below in the case sub judice affirmed, essentially, upon the basis that there being no abandonment in the sense of volitional action by Rose Karam in the termination of malicious intent otherwise existing, the holding in Teramano was controlling.

Appellants essentially argue that the focus should not be on a wooden application of the concept of abandonment, as that term is defined as embracing intentional action, but rather upon the fact that when the parent is deceased, liability insurance coverage exists and all remaining family members join in the suit; thus, the basic rationale of the rule respecting disturbance of family tranquility does not exist and the parental immunity rule should not apply. Assuming, arguendo, there is merit in such argument, there still exists an important public policy aspect which requires consideration.

In adjudicating the issue of parental immunity, courts have frequently drawn an analogy to the doctrine of interspousal immunity in support of the rule. Although the analogy has been criticized in that the origins of the two doctrines are historically distinct, nevertheless both involve inter-family litigation and rest in part upon the same ground, i.e., that of public policy in the prevention of fraud and collusion.[5]

Understandably, therefore, courts in jurisdictions having in effect a doctrine of interspousal immunity have

relied upon the existence of interspousal immunity to support the parental immunity doctrine. Downs v. Poulin (Me. 1966), 216 A.2d 29; Luster v. Luster (1938), 299 Mass. 480, 13 N.E.2d 438. By the same token, when a jurisdiction has abrogated the doctrine of interspousal immunity, courts have utilized such rejection in abrogating parental immunity upon the basis that a principal supporting underpinning, i.e., fraud and collusion, having been rejected in interspousal litigation, it was equally without merit in parental immunity adjudication. Hebel v. Hebel (Alaska 1967), 435 P.2d 8; Gibson v. Gibson (1971), 3 Cal.3d 914, 92 Cal. Rptr. 288, 479 P.2d 648; Black v. Solmitz, (Me. 1979), 409 A.2d 634; Turner v. Turner (Iowa 1981), 304 N.W.2d 786;

France v. A.P.A. Transport Corp. (1970), 56 N.J. 500, 267 A.2d 490; Plumley v. Klein (1972), 388 Mich. 1, 199 N.W.2d 169; Guess v. Gulf Ins. Co., supra (96 N.M. 27).

As noted in Varholla v. Varholla (1978), 56 Ohio St.2d 269, 270, this court in Lyons v. Lyons (1965), 2 Ohio St.2d 243, approved interspousal immunity with one of the three principal reasons being articulated as, "the immunity prevents fraud and collusion at the expense of tactically disadvantaged insurance companies." In Bonkowsky v. Bonkowsky (1982), 69 Ohio St.2d 152, this court reaffirmed its adherence to the doctrine of interspousal immunity.

We view Bonkowsky as foreshadowing our holding herein inasmuch as we cannot logically accept as meritorious the collusion argument to support a doctrine of interspousal immunity and yet find the same argument insubstantial in child-parent litigation. This is particularly so when, as here, the surviving parent occupies the positions of plaintiff, in both a representative and individual capacity, and also of defendant in a representative capacity, and the children seeking damages are under his cutody and control and dependent upon him for care and support.[6]

For the above reasons, we reject appellants' first proposition of law and adhere to the rule of parental immunity for negligent acts by a parent as enunciated in Teramano v. Teramano, supra.

As a second proposition of law appellants assert the court erred in sustaining a motion to dismiss the two insurance companies. We agree that this was error, but not prejudicial. Although the general rule is that no direct action is permissible by an injured party against a tortfeasor's liability insurance company, the right of action against the company arising under R.C. 3929.20 only after the tortfeasor has obtained a judgment against the insured which is unpaid, this court enunciated an exception in the second paragraph of the syllabus in Heuser v. Crum (1972), 31 Ohio St.2d 90, as follows:

"Where it is alleged in an action for bodily injuries that

Concurring and Dissenting Opinion, per C. BROWN, J.

such injuries were proximately caused by the negligence of a decedent and that he had a policy of insurance insuring him against liability for such negligence, and it does not appear that any other claims covered by such insurance have been asserted, such action may be brought against the executor or administrator of such decedent, and decedent's liability insurer, at any time within the statute of limitations on such actions without presenting a claim against the estate within the time specified in R.C. 2117.06 or R.C. 2117.07, and timely service of summons upon the insurer-defendant is sufficient to commence the action." (Emphasis added.)

Under the facts herein, the exception is applicable and joinder proper. However, inasmuch as we have rejected appellants' first proposition of law, the error is necessaily harmless.

Accordinly, the judgment of the Court of Appeals, is affirmed.

Judgement affirmed.

VICTOR, LOCHER, HOLMES and KRUPANSKY, JJ., concur.

SWEENEY, Acting C. J., and C. BROWN, J., concur in part and dissent in part.

STEPHENSON, J., of the Fourth Appellate District, sitting for CELEBREZZE, C.J.

VICTOR J., of the Ninth Appellate District, sitting for W. BROWN.

CLIFFORD F. BROWN, J., concurring in part and dissenting in part. The reasons given by this court in this case to support the parental immunity for negligent acts by a parent toward a child, namely, "that of public policy in the prevention of fraud and collusion" and preservation of domestic peace, harmony and tranquility, are the same flimsy rationalizing and irrelevant nonsense used to give continuing life to the interspousal immunity doctrine in Bonkowsky v. Bonkowsky (1982), 69 Ohio St.2d 152. Just as Justice William B. Brown in his dissents in Varholla v. Varholla (1978), 56 Ohio St.2d 269, 271-275, and Bonkowsky, supra, at pages 156-162, recognized the need for eliminating spousal immunity, the urgency for the death of the parental immunity rule is equally compelling. This

clarion call has been recognized by more than half of our states. See, e.g., Sisler v. Seeberger (1979), 23 Wash. App. 612, 596 P.2d 1362; Lee v. Comer (W. Va. 1976), 224 S.E.2d 271; Gibson v. Gibson (1971), 3 Cal.3d 914, 92 Cal. Rptr. 288, 479 P.2d 648; Streenz v. Streenz (1970), 106 Ariz. 86, 471 P.2d 282; Badigan v. Badigan (1961), 9 N.Y.2d 472, 215 N.Y. Supp.2d 35; 41 A.L.R.3d 964-970, Section 13; see footnote 4 herein.[7]

Nothing in the record before us, nor any statistical data dehors the record, supports the finding of this court in this case or in Teramano v. Teramano (1966), 6 Ohio St.2d 117, that family tranquility is preserved or that fraud is prevented by the parental immunity defense which unjustly shackles the innocent injured victims, the Karam plaintiffs, permitting them to suffer a wrong without a remedy. Such a judicial finding is from the dream world, unrealistic and pure drivel. One might just as validly speculate that the parental immunity rule exists to pull the chestnuts out of the fire for the liability insurance companies by reducing in small measure their

total insurance benefits payable, expecting and hoping thereby that insurance premiums will be reduced slightly for all policy holders, including the judges who sustain this ridiculous immunity rule which serves no good and promotes nothing but evil. This rule is solely a product of judicial selfishness, entirely devoid of compassion and a sense of justice.

The rationale that barring the minor Karam plaintiffs from pursuing a tort claim sounding in negligence against a deceased parent's estate will somehow promote family hamony and felicity and preserve parental care, discipline and control completely escapes.[8] Since the tortfeasor parent

Concurring and Dissenting Opinion,
per C. BROWN, J.

named as defendant in the legal action is now deceased, such action can have no effect whatever on the discharge of the sur-

Concurring and Dissenting Opinion
per, C. BROWN J.

viving parent's responsibilities, nor can it disrupt the harmony of the surviving family members. Rather, a successful suit by the Karm children against the deceased parent's administrator, the children thereafter obtaining the liability insurance benefits to satisfy such claims, would ease the financial burdens caused by the bodily injuries, thereby promoting family harmony. When the reasons for a rule cease the rule should cease. Therefore parental immunity should be abrogated.

Even if Ohio preserves the parental immunity rule generally, at a minimum, an exception should be carved in this case, so that parental mmunity is rendered inapplicable by the death of the parent. This exception has been established in many other jurisdictions. Union Bank & Trust Co. v. First Nat. Bank & Trust Co. (C.A. 5, 1966), 362 F.2d 311, affirmed following remand, 396 F.2d 795; Thurman v. Etherton (Ky. 1970), 459 S.W.2d 402; Brennecke v. Kilpatrick (Mo. 1960), 336 S.W.2d 68; Dean v. Smith (1965), 106 N.H. 314 211 A.2d 410; Palosey v. Tepper (1962), 71 N.J. Super 294, 176 A.2d

818; Parks v. Parks (1957), 390 Pa. 287, 135 A.2d 65; 41 A.L.R.3d, 944-946.

Nor is the argument convincing that such suits result from collusion and are a source of fraud on the courts. Modern civil procedure and discovery tools available to both the courts and the "tactically disadvantaged insurance companies" will easily meet the challenge of spurious or fraudulent claims. See Bonkowsky, supra, at page 163.

As it did in Bonkowsky, this court again misses an opportunity to abrogate an outmoded immunity doctrine. While respecting the principle of stare decisis, the need for modification and modernization in the law is equally compelling. "Modification implies growth. It is the life of the law." Washington v. Dawson & Co. (1924), 264 U.S. 219, 236 (Brandeis, J., dissenting opinion.)

Recognizing that where liability insurance exists, the domestic tranquility argument has no validity, and being confident that our adversary system is capable of rooting out fraud and collusion, I would join the ever increasing number of enlightened jurisdictions and overturn the

judicially created shibboleth of "parental immunity" to give injured minors their rightful day in court. As I did in Bonkowsky, I dissent from a decision which does not serve the purpose of justice.

I concur in that part of the judgment of this court affirming the dismissal by the trial court of the two insurance companies as defendants.

SWEENEY, Acting C.J., concurs in the foregoing concurring and dissenting opinion.

FOOTNOTES

[1] Although the entry granting summary judgment is general in form, we presume the trial court intended by its judgment to deny relief upon the individaul claim of Maurice Karam, as well as the claims of the minors, upon the basis the claim was one for consequential damages or barred by the rule of interspousal immunity, or both, and thus the judgment was final and not interlocutory by reason of Civ. R. 54(B).

[2] The generally recognized exceptions were summarized in Gibson v. Gibson (1971), 3 Cal.3d 914, at page 918, 92 Cal. Rptr. 288, 290, 479 P.2d 648, thusly: "No sooner had American courts, including our own, embraced the parental immunity doctrine than they began to fashion a number of qualifications and exceptions to it. In Martinez v. Southern Pacific Co., supra, 45 Cal.2d 244, we allowed an emancipated minor to sue her parent for simple negligence; in Emery v. Emery (1955), 45 Cal.2d 421 [289 P.2d 218], we held that willful or malicious torts were not within the scope of the immunity. Courts in other states compounded the doctrine's idiosyncrasies in decisions permitting tort actions by minors against the estate of a deceased parent (Davis v.

Smith (3d Cir. 1958), 253 F.2d 286; Dean v. Smith (1965), 106 N.H. 314 [211 A2d 410]; Brennecke v. Kilpatrick (Mo. 1960), 336 S.W.2d 68); against the parent in his business capacity (Signs v. Signs (1952), 156 Ohio St. 566 [103 N.E.2d 743]; Borst v. Borst (1952), 41 Wn.2d 642 [251 P.2d 149]; Lusk v. Lusk (1932), 113 W. Va. 17 [166 S.E. 538]; Dunlap v. Dunlap, supra, 84 N.H. 352); and against the parent's employer under respondeat superior for the tort of the parent within the scope of his employment. (Stapleton v. Stapleton (1952), 85 Ga. App. 728 [70 S.E.2d 156]; O'Connor v. Benson Coal Co. (1938), 310 Mass. 145 [16 N.E.2d 636]; Mi-Lady Cleaners v. McDaniel (1938), 235 Ala. 469 [179 So. 908, 116 A.L.R. 639]; Chase v. New Haven Waste Material Corporation (1930), 111 Conn. [150 A. 107, 68 A.L.R. 1497].)"

[3] The identifiable reason for only partial abrogation of the rule is a general consensus of opinion that certain areas of conduct inherent in the parent-child relationship involving the exercise of discretion must be entitled to immunity. See Section 895G of the Restatement of Torts 2d (1979) and commentary thereto. A marked lack of unanimity in accommodating this area of immunity exists in those jurisdictions which have abrogated the immunity rule. Courts have ranged from

undertaking to judicially enunciate certain exceptions, as in Goller v. White (1963), 20 Wis.2d 402, 122 N.W.2d 193, i.e. "(1) [w]here the alleged negligent act involves an exercise of parental authority over the child, and (2) where the alleged negligent act involves an exercise of ordinary parental discretion with respect to the provision of food, clothing, housing, medical and dental services, and other care" (Id. at 413); to adoption in Gibson v. Gibson, supra (3 Cal.3d 914), at page 921, of immunity under a test of "what would an ordinary reasonable and prudent parent have done in similar circumstances?"; confinement to abrogation in negligent driving cases only with precise areas of immunity to be subsequently developed in future adjudication, Hebel v. Hebel (Alaska 1967), 435 P.2d 8; together with two jurisdictons restricting recovery solely to liability insurance proceeds, Sorenson v. Sorenson (1975), 369 Mass. 350, 339 N.E.2d 907, and Williams v. Williams (Del. 1976), 369 A.2d 669. The Goller exceptions have been criticized in Gibson v. Gibson, supra, at page 921, and Anderson v. Stream (Minn. 1980), 295 N.W.2d 595, 598; the reasonable parent exception has been the subject of criticism in Pedigo v. Rowley (1980), 101 Idaho 201, 610 P.2d 560; and the abrogation of immunity only in automobile negligence cases

together with restricing recovery to insurance proceeds rejected in Black v. Solmitz (Me. 1979), 409 A.2d 634, 639, as "[t]hose limitations seem to us objectionable as suggesting that the decision to restrict immunity is based on expediency rather than on correct legal principles. In our view such decisions are difficult to defend against the charge that they effect a result more appropriately reserved for legislation. Furthermore, the Massachusetts rule tailoring abrogation to the amount of the parent's automobile liability insurance leads to difficulties by unavoidably introducing the fact of defendant's insurance, and the amount of it, as elements of a claim or defense."

Given the inability of courts to agree, when the parental immunity rule is partially abolished, of the areas in which it should be retained, it would appear a reasonable conclusion that abrogation in any event should emanate from the General Assembly with the scope of immunity abolished and remaining precisely drawn for the benefit of litigants, bench and Bar.

[4] The parental immunity doctrine has not been initially adopted, or if adopted, has been abrogated in whole or in part in the following jurisdictions:

1. Alaska, Hebel v. Hebel, supra.
2. Arizona, Streenz v. Streenz (1970), 106 Ariz. 86, 471 P.2d 282.

3. California, Gibson v. Gibson, supra.

4. Connecticut, Gen. Stat. Section 52-572c (1981 Rev.).

5. Delaware, Williams v. Williams, supra.

6. Hawaii, Tammashiro v. De Gama (1969), 51 Haw. 74, 450 P.2d 998.

7. Iowa, Turner v. Turner (1981), 304 N.W.2d 786.

8. Kansas, Nocktonick v. Nocktonick (1980), 227 Kan. 785, 611 P.2d 135.

9.Kentucky, Thurman v. Etherton (1970), 459 S.W.2d 402; Rigdon v. Rigdon (1971), 465 S.W.2d 921.

10. Massachusetts, Sorensen v. Sorensen, supra.

11. Maine, Black v. Solmitz, supra.

12. Michigan, Plumley v. Klein (1972), 388 Mich. 1, 199 N.W.2d 169.

13. Minnesota, Silesky v. Kelman (1968), 281 Minn. 431, 161 N.W.2d 631; Anderson v. Stream, supra.

14. Missouri, Fugate v. Fugate (1979), 582 S.W.2d 663.

15. New Hampshire, Briere v. Briere (1966), 107 N.H. 432, 224 A.2d 588.

16. New Jersey, France v. A.P.A. Transport Corp. (1970), 56 N.J. 500, 267 A.2d 490.

17. New Mexico, Guess v. Gulf Ins. Co. (1981), 96 N.M. 27, 627 P.2d 869.

18. New York, Gelbman v. Gelbman (1969), 23 N.Y.2d 434, 245 N.E.2d 192.

19. Nevada, Rupert v. Steinne (1974), 90 Nev. 397, 528 P.2d 1013.

20. North Carolina, Gen. Stat. Section 1-539.21 (1981 Supp.).

21. North Dakota, Neuelle v. Wells (1967), 154 N.W.2d 364.

22. Pennsylvania, Falco v. Pados (1971), 444 Pa. 372, 282 A.2d 351.

23. South Carolina, Elam v. Elam (1980), 275 S.C. 132, 268 S.E.2d 109.

24. Virginia, Smith v. Kauffman (1971), 212 Va. 181, 183 S.E.2d 190.

25. Vermont, Wood v. Wood (1977), 135 Vt. 119, 370 A.2d 191.

26. Washington, Merrick v. Sutterlin (1980), 93 Wash. 2d 411, 610 P.2d 891.

27. West Virginia, Lee v. Comer (1976), 224 S.E.2d 721.

28. Wisconsin, Goller v. White, supra.

The Supreme Court of Florida has not decided the issue of parental immunity. However, several appellate courts in Florida have decided the issue with conflicting results. See Ard v. Ard (Fla. App. 1981), 395 So.2d 586; Horton v. Unigard Ins. Co. (Fla. App. 1978), 355 So.2d 154.

The following jurisdictions continue to follow the doctrine of parental immunity:

1. Alabama, Owens v. Auto Mutl. Indem. Co. (1937), 235 Ala. 9, 177 So. 133.

2. Arkansas, Thomas v. Inmon (1980), 268 Ark. 221, 594 S.W.2d 853.

3. Colorado, Horton v. Reaves (1974), 186 Colo. 149, 526 P.2d 304; Hansen v. Hansen (Colo. App. 1979), 608 P.2d 365.

4. Georgia, Wisenbaker v. Zeigler (1976), 140 Ga. App. 90, 230 S.E.2d 97.

5. Idaho, Pedigo v. Rowley, supra.

6. Illinois, Gerrity v. Beatty (1978), 71 Ill.2d 47, 373 N.E.2d 1323; Illinois Nat'l Bank & Trust Co. v. Turner (1980), 83 Ill. App.3d 234, 403 N.E.2d 1256.

7. Indiana, Hunter v. State (1977), 172 Ind. App. 397, 360 N.E.2d 588; Vaughan v. Vaughan (1974), 161 Ind App. 497, 316 N.E.2d 455.

8. Maryland, Shell Oil Co. v. Pyckman (1979), 43 Md. App. 1, 403 A.2d 379; Montz v. Mendaloff (1978), 40 Md. App. 220, 388 A.2d 568.

9. Mississippi, McNeal v. Estate of McNeal (1971), 254 So.2d 521.

10. Montana, State Farm Mutual Auto Ins. Co. v. Leary, (1975), 168 Mont. 482, 544 P.2d 444.

11. Nebraska, Pullen v. Novak (1959), 169 Neb. 211, 99 N.W.2d 16.

12. Ohio, Teramano v. Teramano (1966), 6 Ohio St.2d 117, 216 N.E.2d 375.

13. Oklahoma, Van Wart v. Cook (Okla. App. 1976), 557 P.2d 1161.

14. Oregon, Chaffin v. Chaffin (1964), 239 Ore. 374, 397 P.2d 771.

15. Rhode Island, Castellucci v. Castellucci (1963), 96 R.I. 34, 188 A.2d 467.

16. Tennessee, Campbell v. Gruttemeyer (1968), 222 Tenn. 133, 432 S.W.2d 894.

17. Texas, Felderhoff v. Felderhoff (1971), 473 S.W.2d 928.

18. Wyoming, Oldman v. Bartshe (1971), 480 P.2d 99.

[5] The tenor of non-syllabus language in Signs v. Signs (1952), 156 Ohio St. 566, can fairly be read to evidence a skepticism of the rationale supporting the rule of parental immunity. Indeed, language from Signs was utilized in Falco v. Pados, supra, in support of rejection of the parental immunity doctrine. In Signs not only was it stated that the general rule of the interspousal immunity did not support parental immunity, the court further addressed and found unpersuasive the fraud and collusion underpinning for the rule. However, the language in Signs, decided in 1952, must be read in light of the strong policy position respecting fraud and collusion adopted in the other aspect of inter-family tort litigation, i.e., interspousal, in 1965 in Lyons v. Lyons, 2 Ohio St.2d 243, and in the adherence to the parental immunity rule in the following year in Teramano v. Teramano, supra.

[6] The Supreme Court of Kansas in Nocktonick v. Nocktonick, supra, abrogated the doctrine of parental immunity but retained interspousal immunity. We view such result as paradoxical in the same vein as Prosser on Torts (4 Ed.), 865, fn. 75, which describes as the "height of inconsistency" the holdings by some courts in permitting action by the wife but denying it to the child.

[7] Footnote 4 recognizes 28 jurisdictions have refused to adopt or, if adopted, have abrogated in whole or in part the parental immunity doctrine, whereas only 18 jurisdictions follow the parental immunity doctrine. The former category of 28 states will increase in number while the latter category will correspondingly decrease as judicial wisdom spreads. We should not stand in line until 49 states have abrogated the immunity doctrine before we join the union of judicial progress and improvement of the quality of justice. It would be a logical and easy short step now, basing abrogation of the rule on the excellent rationale of this court in Signs v. Signs (1952), 156 Ohio St. 566, where we held that a parent in his business or vocational capacity is not immune from a personal tort action by his unemancipated minor child.

[8] As the majority opinion accurately observes, the opinion by Judge Woods in Hewlett v. George (1891), 68 Miss. 703, 711, 9 So. 885, asserts the parental immunity rule's purpose is to promote domestic peace and harmony. However, no empirical data has ever been adduced in any case that immunity fulfills such a purpose. Just because one Judge Woods in 1891 in Mississippi pronounced an unproven platitude and thereby judicially created an immunity rule does not justify this court or any of the 17 jurisdictions clinging desperately this shrinking minority view in continuing to parrot such balderdash.

Similarly, the bald averment that immunity prevents fraud and collusion is not uncontradicted truth. We should recognize that fraud and collusion can be prevented in any action by an unemancipated child against his parent, as did the learned jurists in Sorensen v. Sorensen (1975), 369 Mass. 350, 365, 339 N.E.2d 907:

"The existence of collusion and lack of cooperation is not difficult to establish in the ordinary motor vehicle accident case. Prompt, effective insurance company investigtion and requirement of prompt reports of accidents to the registry of motor vehicles and to the insurer quickly establish the essential facts. Normally, any attempt at deviation from

the facts by the insured will be speedily evident and will warrant disclaimer by the insurance carrier. The parent is usually represented by counsel provided by the insurance company. Such counsel is ever alert to protect the interests of the insurance company and ready to expose any attempts at collusive and fraudulent conduct. Any overt attempt at collusion constitutes a criminal offense and will be punishable as such.

"Some collusive claims may succeed. But this does not justify the formulation of a rule of blanket denial of recovery for all minors. It would be unjust to bar arbitrarily the claims of injured minors deserving of relief solely because some cases may involve possible collusion between two parties."

The cogent dissent of Justice Mays in Thomas v. Inmon (1980), 268 Ark. 221, 224-225, 594 S.W.2d 853, disposes of both the fraud and collusion rationalization and the parental harmony canard as follows:

"Although a tort action by a child against his parent may suggest family disharmony, generally the real party in interest is the insurance company which provides financial protection to the parent. Just as most tort suits are not undertaken in the absence of a deep pocket, few minor children would sue their parents in the absence of insurance. Moreover, no greater

disruption of family harmony is caused by a suit pitting a child against a parent than a suit pitting brother against sister or husband against wife which is allowed. Leach v. Leach, 227 Ark, 559, 300 S.W.2d 15 (1957). As to the consideration of fraud or collusion, no greater danger of collusion exists in child-parent suits than in other suits among family members. Although the possibility of fraud or perjury exists to some degree in all cases, we do not abolish a cause of action solely because of that danger. In short, the likelihood of family discord or collusive suits is not significantly enhanced by permitting child-parent suits and certainly does not justify abolishing an unemancipated child's right to be made financially whole when wrongfully injured."

Since this Karam case involves liability insurance held by the decedent tortfeasor, the rationale expressed in Streenz v. Streenz, supra, at 88 is applicable:

"* * * Although we agree with Hebel, supra, that 'the existence of liability insurance does not create liability' where none existed before, we think the widespread prevalence of such insurance is a proper element to consider. Where insurance is available to compensate the child for his injuries, the possiblity of disruption of family unity and peace is negligible. * * *"

See, also, 1 Harper & James, The Law of Torts 649, Section 8.11; Prosser on Torts (4 Ed.), 868 Section 122; McCurdy, Torts Between Parent and Child, 5 Vill. L. Rev. 521, 546; Comment, Tort Actions Between Members of the Family - Husband and Wife - Parent & Child, 26 Mo. L. Rev. 152, 191.

To retain in Ohio a parental immunity rule because it was pronounced without thorough analysis of its widespread application and consequences by an obscure judge in Mississippi in 1891, and then spread as gospel truth without further sound analysis in a minority of jurisdictions, does a disservice to the cause of justice.

Moreover, Hewlett was an action by a minor plaintiff against her mother for "'willfully, illegally, and maliciously' securing her imprisonment in an insane asylum in order to obtain her property," see Sorensen v. Sorensen, supra, at 354. Unlike the present case, the wrongful act complained of involved the reasonable exercise of parental authority over the child, and ordinary parental discretion with respect to provisions for the care and necessities of the child. Hewlett and its progeny, at a minimum, should be confined to the same or similar situations. See, e.g., Horn v. Horn (Ky. 1982), 50 U.S.L.W. 2612; Goller v. White (1963), 20 Wis.2d 402, 122 N.W.2d 193.

Lastly, the suggestion of this court, see last paragraph of footnote 3, that abrogation of the parental immunity rule "should emanate from the General Assembly" is an abdication of the judicial function. It is an uncourageous passing of the judicial buck. What the judges and courts can create, judges and courts can eradicate. That is simple law and logic with its underpinning in common sense.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,

City of Columbus. 1982 TERM
To Wit July 19, 1982

Rashid Karam et al.,
Appellants.,

vs. No. 81-958
HEARING

Allstate Insurance Company
et al.,
Appellees.

It is ordered by the court that rehearing in this case is denied.

I, THOMAS L. STARTZMAN, of Clerk the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No. _____ Page _____

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the seal of the Supreme Court this 19th day of July, 1982.

THOMAS L. STARTZMAN, Clerk

APPENDIX B

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Rashid Karam, Rola Karam,
and Rita Karam, Minors, By
and Through Their Father and
Next Friend, Maurice Karam,

and

Maurice Karam,

Plaintiffs-Appellants,

v. No. 80AP-963

Allstate Insurance Company,

and

Buckeye Union Insurance Company,

and

Maurice Karam, Administrator
of the Estate of Rose Karam,

Defendants-Appellees.

D E C I S I O N

Rendered April 28, 1981

WOLSKE & BLUE,
MR. WALTER J. WOLSKE, JR.,
580 South High Street,
Suite 320,
Columbus, Ohio 43215,
For Plaintiffs-Appellants.

CRABBE, BROWN, JONES, POTTS & SCHMIDT
MR. THEODORE D. SAWYER and
MR. DAVID J. RICHARDS, of Counsel,
2500 One Nationwide Plaza,
Columbus, Ohio 43215,

and

GINGHER & CHRISTENSEN,
MR. JOHN M. MAHOTA, of Counsel,
311 East Broad Street
Columbus, Ohio 43215,
For Defendants-Appellees.

REILLY, J.

This is an appeal from a judgment of the Court of Common Pleas, Franklin County, Ohio.

The record shows that an accident occurred on August 14, 1978 on Dublin Road in Franklin County, Ohio,

involving vehicles operated by William E. Chapin and Rose Karam. Consequently, Rose Karam, her two nieces and one nephew were killed in the collision. Plaintiffs Rashid, Rola and Rita Karam, children of Rose Karam, sustained injuries from the collision.

Plaintiffs, through their father and next friend, Maurice Karam, brought this action to recover for injuries sustained from the accident in which their mother negligently collided with another vehicle. The complaint named as defendants, Allstate Insurance Company, Buckeye Union Insurance Company and Maurice Karam as the Administrator of the Estate of Rose Karam.

The trial court by decision and entry on May 22, 1980, dismissed the foregoing insurance companies, citing Chitlik v. Allstate Ins. Co. (1973), 34 Ohio App. 2d 193. Thereafter, on November 26, 1980, the trial court also sustained defendant's motion for summary judgment.

Plaintiffs have now perfected this appeal, including two assignments of error:

> "I. The trial court erred in its finding that Familial Immunity bars Plaintiffs' cause of action because the doctrine does not adhere under the facts of the instant case.
>
> II. The trial court erred in dismissing Plaintiffs' direct action against decedent's liability insurers."

Plaintiffs' first assignment of error is not well taken. The Supreme Court wrote in Teramano v. Teramano (1966), 6 Ohio St. 2d 117, at page 119, concerning the family immunity doctrine:

> "Numerous cases gathered in the A.L.R. annotation (19 A.L.R. 2d 423) indicate substantial agreement that no action lies by the unemancipated minor against the parent unless the acts done by the parent are in his vocational capacity or show a malicious intention to injure (rape, murder, punishment inflicted in malo animo)."

Furthermore, the first paragraph of the syllabus in the Teramano, supra, case reads as follows:

> "1. A parent is immune from suit by his unemancipated minor child for tort unless facts of the case are sufficient to show abandonment of the parental relationship. (Signs v. Signs, 156 Ohio St. 566, explained.)"

Finally, in Teramano, supra, the Supreme Court delineated the exception to the family immunity doctrine, at pages 118-119, as follows:

> "* * * That court went on to say that in the case of 'malicious injuries' abandonment of the parental relationship should be implied.
>
> "In searching for a rationale which can be applied in this and other such cases and by which tortious conduct of a parent toward a child can be judged as actionable or nonactionable, we note the reoccurrence of the phrase, 'abandonment of the parental relationship,' in the most of the well-reasoned cases. If the parental relationship is abandoned, the reasons for the immunity ceases to exist. A corollary of this rule is that, where there exists a dual relationship between parent and child such as master and servant, or carrier and passenger, the domestic relationship is merely

> incidental and becomes so logically irrelevant as to prevent immunity from attaching. See annotation, 19 A.L.R. 2d 423, Infant-Tort Action Against Parent, at page 432.
>
> "This was the real basis of the judgment of this court in Signs, A Minor v. Signs, 156 Ohio St. 566, where it was decided that a parent in his business or vocational capacity is not immune from a personal-tort action by his unemancipated minor child."

Abandonment involves something more than severing a relationship. It concerns the element of choice and intent to relinquish one's rights or interests. There is nothing to indicate that Rose Karam intended or chose to abandon the relationship with her children. She did not choose her own demise and manifestly did not

choose to abandon her children. Nothing indicates any malicious intent on Rose Karam's part, nor is there any evidence of an exception to the parent-child relationship. Accordingly, the Teramano, supra, decision determines this case. Consequently, plaintiffs' first assignment of error is overruled.

Plaintiffs' second assignment of error is also not well taken. Insurance companies' contracts involve liability only if an insured is liable. Since there is no liability, as indicated above, even if there was error, it would necessarily be non-prejudicial. Thus, plaintiffs' second assignment of error is also overruled.

Whereupon, for the foregoing reasons, the judgment is affirmed.

Judgment affirmed.

WHITESIDE and McCORMAC, JJ., concur.

IN THE COURT OF APPEALS OF
FRANKLIN COUNTY, OHIO

Rashid Karam et al.,

Plaintiffs-Appellants,

v. No. 80AP-963

Allstate Insurance Company
et al.,

Defendants-Appellees.

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on April 28, 1981, the assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed.

WHITESIDE, REILLY & McCORMAC, JJ.

By_____
Judge Archer E. Reilly

cc: Walter J. Wolske
Theodore D. Sawyer and
David J. Richards
John M. Mahota

APPENDIX C

COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

RASHID KARAM, et al

Plaintiffs

vs. Case No. 80CV-01-235

ALLSTATE INSURANCE COMPANY, et al.

Defendants.

D E C I S I O N

Rendered this 6th day of November, 1980.

TYACK, J.

This cause came on to be heard upon oral hearing on the motion of Defendants for summary judgment. The matter was submitted on the pleadings

and upon the answers to request for admissions filed by plaintiffs.

The Court finds that there are no genuine issues of material fact to be determined and defendants are entitled to summary judgment as a matter of law.

Motion for summary judgment is hereby SUSTAINED. Counsel for Defendants shall prepare and file proper Judgment Entry per court rule.

GEORGE E. TYACK, JUDGE

Appearances:
Walter J. Wolske, Jr.
Attorney for Plaintiffs
Theodore D. Sawyer
David J. Richards
Attorney at Defendant
John M. Mahota
Attorney for Co-Defendant

IN THE COMMON PLEAS COURT OF
FRANKLIN COUNTY, OHIO

RASHID KARAM, ET AL.,

Plaintiffs

v. Case No. 80CV-01-235

ALLSTATE INSURANCE COMPANY, ET AL., JUDGE TYACK

Defendants

ENTRY

This matter having come on for hearing upon motion of defendant, Maurice Karam, administrator, for summary judgment and the court finding no genuine issues of material fact to be determined and that defendant is entitled to summary judgment as a matter of law, said motion is hereby sustained and judgment is accordingly

rendered for defendant, Maurice Karam, administrator.

JUDGE TYACK

APPROVED:

Submitted by letter of Nov. 10, but not approved.

WALTER J. WOLSKE, JR.
Attorney for Plaintiffs
580 South High Street
Columbus, Ohio 43215

CRABBE, BROWN, JONES, POTTS & SCHMIDT

By
THEODORE D. SAWYER (SAW01)
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Columbus, Ohio 43215

APPENDIX D

28 U.S.C. Section 1257

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

* * *

> [3] By writ of certiorari . . . where any title, privilege or immunity is specially set up or claimed under the Constitution.
> . . .

Ohio Constitution Article IV Section 2:

> [A] supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge

having the period of the longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place instead of the absent judge. . . .

U.S. Constitution Amend XIV Section 1:

No state shall . . . deprive any person of life, liberty or property, without due process of law. . . .

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No. 82-662

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

RASHID, ROLA & RITA KARAM, BY AND THROUGH
THEIR FATHER AND NEXT BEST FRIEND,
MAURICE R. KARAM
AND
MAURICE R. KARAM, PETITIONERS,

v.

ALLSTATE INSURANCE COMPANY,
BUCKEYE UNION INSURANCE COMPANY
AND MAURICE R. KARAM, ADMINISTRATOR
OF THE ESTATE OF ROSE KARAM.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OHIO

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QUESTION PRESENTED

Whether the Ohio Supreme Court's interpretation of the Ohio Constitution, Article IV, Section 2, is a correct interpretation, and, if so, whether the Ohio Constitution operated to deny plaintiffs due process of law.

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OPINIONS BELOW

The respondents accept the recitation of opinions below as set forth in the Petitioners' Brief.

JURISDICTION

The respondents accept the recitation of jurisdiction as set forth in the Petitioners' Brief.

STATUTORY PROVISIONS INVOLVED

Constitution of Ohio, Article IV, § 2, as amended 5/7/68

§ 2 The supreme court.

(A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the

place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

Constitution of Ohio, Article IV, § 2, amended November 7, 1944, read as follows:

§2. [The supreme court.] The supreme court shall, until otherwise provided by law, consist of a chief justice and six judges, and the judges now in office in that court shall continue therein until the end of the terms for which they were respectively elected, unless they are removed, die or resign. If any of said judges shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice, or in case of the absence or disability of the chief justice, the judge having the longest period of service upon that court, may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. The judge of the court of appeals so designated shall temporarily perform the duties of a judge of the supreme court as to such cause or causes designated. A majority of the supreme court shall be necessary to constitute a quorum or to pronounce a decision, except as hereinafter provided. It shall have

original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in all cases involving questions arising under the constitution of the United States or of this state, in cases of felony on leave first obtained, and in cases which originated in the courts of appeals, and such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law. It shall hold at least one term in each year at the seat of government, and such other terms, there or elsewhere, as may be provided by law. The judges of the supreme court shall be elected by electors of the state at large for such term, not less than six years, as may be prescribed by law, and they shall be elected, and their official term shall begin, at such time as may now or hereafter be fixed by law. Whenever the judges of the supreme court shall be equally divided in opinion as to the merits of any case before them and are unable for that reason to agree upon a judgment, that fact shall be entered upon the record and such entry shall be held to constitute an affirmance of the judgment of the court below. No law shall be held unconstitutional and void by the supreme court without the concurrence of at least all but one of the judges, except in the affirmance of a judgment of the court of appeals declaring a law unconstitutional and void. In cases of public or great general interest

> the supreme court may, within such limitations of time as may be prescribed by law, direct any court of appeals to certify its record to the supreme court, and may review, and affirm, modify or reverse the judgment of the court of appeals. All cases pending in the supreme court at the time of the adoption of this amendment by the people, shall proceed to judgment in the manner provided by existing law. No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court."

STATEMENT OF THE CASE

On February 16, 1982, petitioners and respondents appeared before the Ohio Supreme Court and presented the merits of their respective cases. At that time, neither party raised an objection to the fact that Judges Stephenson and Victor were sitting for Justices Celebrezze and Brown. Four months later and after petitioners had received an adverse decision, they then raised the issue that the court was not a competent body to have decided the case due to the two visiting judges. Petitioners, in their motion for rehearing, claimed that,

at most, only one justice could be absent, or, in the alternative, the only permissible excuse for a justice's absence was disqualification. The Ohio Supreme Court held that neither argument was meritorious.

REASONS FOR DENYING THE PETITION

If the respondents correctly read the petitioners' brief, it appears that the argument being made by petitioners is not an attack on the Ohio Constitution, Article IV, Section 2, but rather a disagreement with the Ohio Supreme Court's interpretation of that provision. The petition should be denied because petitioners have waived their objection to the composition of the court by proceeding with their argument and by raising no objection until after they had received an adverse decision. The petition should also be denied because the Ohio Supreme Court's interpretation of the Ohio Constitution was correct. In addition, a quorum of five elected justices of

the Ohio Supreme Court decided the case, the majority of whom held for the respondents. Finally, the United States Supreme Court should not disturb the Ohio Supreme Court's interpretation of the Ohio Constitution.

Petitioners, when appearing before the court on February 16, 1982, were well aware that the Supreme Court was comprised of five justices and two visiting judges. Nonetheless, petitioners, with full knowledge of that fact, failed to raise any objection to the composition of the court, and proceeded to argue their case. Indeed, an objection to the composition of the court was made only after the court reached a decision adverse to petitioners. Under such circumstances, petitioners have waived their right to object to the composition of the court.

The general rule is that a complaining party who has knowledge concerning the absence of qualifications of a judge and fails to raise them before proceeding to a hearing may

not successfully raise the question on review. See 73 ALR 2d 1267, Sections 12, 14 and cases cited therein. The essence of the ALR annotation is that the objection to qualifications of the judge, or, in this case, the composition of the court, must have been raised prior to proceeding with the oral argument or hearing. As stated in 22 O. Jur. 3d, Courts and Judges, § 51:

> "Ohio is in line with the view that where there is original, constitutional or statutory authority for an election or appointment of a special, substitute or pro tem judge, and the record does not affirmatively show that the person in question could not, in any event, legally perform the functions of such a judgeship, objections to the title or authority of such a judge cannot first be made upon appeal."

Reason clearly supports this rule in that it prohibits litigants from proceeding with the hearing when they have full knowledge of an objection but fail to raise it unless an adverse decision is reached. Simply put, the petitioners cannot have their cake and eat it too. The syllabus in Tari v. State, 117 Ohio

St. 481, 159 N.E. 594 (1927), which is the law in the State of Ohio, as enunciated by the Ohio Supreme Court, reads:

> "1. Interest of a judge in the decision of a cause pending before him disqualifies him from hearing and determining the cause."
>
> "2. Such disqualification is waived unless objection be made thereto at the earliest opportunity, and if known to the complaining party at or before trial and if no objection be made in the trial court, will be deemed to be waived." See also Ashland Bank & Savings Co. v. Hausman, 5 Ohio App. 165 (1915) and Montaldo v. State, 51 Ohio App. 6, 199 N.E. 198 (1935).

Thus, even if petitioners' arguments as to the composition of the court were meritorious, any objection thereto was waived by their proceeding with the argument and raising no objections until after they had received an adverse decision.

The Ohio Constitution, Article IV, Section 2, specifically provides that the Chief Justice of the Ohio Supreme Court may appoint substitute judges from any court of appeals for any member of the Supreme Court who is

unable to act in a particular action. The Constitution provides in relevant part:

> "If any member of the court shall be unable, by reason of illness, disability, or disqualification to hear, consider and decide a cause or causes...". (Emphasis supplied). Ohio Constitution, Article IV, Section 2.

It is apparent from the above cited language that the Ohio Constitution allows for replacement of "any member" who is unable to decide the case. There is simply no limitation in the Constitution which restricts the number of substitute judges to one.

A properly appointed substitute judge in Ohio generally has the same power and responsibilities of a regular justice during the temporary period in which he is presiding in the Supreme Court. 22 O. Jur. 3d, Courts and Judges, §26. The Ohio Constitution provides the requisite authority for the delegation of this judicial power. Demereaux v. State, 35 Ohio App. 418, 420, 172 N.E. 551 (1930).

The basis of the petitioners' argument

is that the Ohio Constitution, Article IV, Section 2, is so worded as to limit a competent Ohio Supreme Court tribunal to six regular elected justices and one visiting or substitute justice. Accordingly, it is necessary to analyze Ohio case law and the historical development of the constitutional provision to illustrate that such a narrow interpretation of this provision is clearly awry. The purpose of statutory construction is to arrive at the intent of the language used. Bowytz v. Tax Commission of Ohio, 12 Ohio Op. 449, 32 N.E. 2d 39 aff'd, 135 Ohio St. 278, 20 N.E. 2d 528 (1939).

Article IV, Section 2 of the original Ohio Constitution made no reference to or provision for the substitution of justices for the Supreme Court. However, on November 7, 1944, this provision was amended to provide for the substitution of justices. The amendment to Article IV, Section 2, as adopted in 1944, which is the immediate predecessor to

the present provision, used language which could be considered to allow multiple substitutions by stating:

> "If any of said judges shall be unable (emphasis supplied)."

Subsequent to this amendment, the Ohio Supreme Court in State v. Cook, 146 Ohio St. 348, 66 N.E. 2d 207 (1946), decided a case with two substitute judges and five justices. Only through the use of the substitutions did the court have sufficient justices to render a decision. It is irrelevant to the issue that the parties agreed to the substitutions since the Ohio Constitution expressly provided for such an action. The Ohio Supreme Court in State v. Cook was competent to render a decision regardless of its composition of justices and visiting judges. The Ohio Constitution did not then and does not now require consent of the parties for substitution of the justices.

The present Ohio Constitution is consistent with its predecessor through use of the

words "if any member...". The petitioners laboriously attempt, through the use of occult analysis of the phrase "if any member", to demonstrate that the substitution for justices made the tribunal incompetent and that they could now challenge the tribunal's competency on appeal rather than objecting by motion before a decision was rendered. Petitioners attempt to show that the substitute justices were not de facto judges. We would agree that the appellation "de facto judge" is not properly applied to the two substitute justices. According to Black's Law Dictionary, 375 (rev. 5th ed. 1979) a de facto judge is:

> "[a] judge who functions under color of authority but whose authority is defective in some procedural form."

The judges in the instant case were properly appointed under the Ohio Constitution and, therefore, were not judges de facto.

The petitioners' argument clearly conflicts with the apparent meaning of the constitutional provision at issue and Ohio case law

suggests that such construction be rejected. State v. Foraker, 46 Ohio St. 677, 23 N.E. 491 (1899). The wording of the predecessor amendment to Article IV, Section 2 of the Ohio Constitution and the language of the present provision are so similar that it was clearly the intent of the drafters of the Ohio Constitution that they should be interpreted the same. The drafters did not, as the petitioners would have us believe, mean "any one member". Instead, as stated in Myers v. Benjamin Rose Institute, 92 Ohio St. 238, 110 N.E. 928 (1915):

> "Uniformity, certainty and stability in the law are salutory results always to be sought, and when the highest court of the state has given a construction to a constitutional provision, which has been accepted and acted on by the legislature throughout a long period, it should not lightly be set aside." p. 249

Ohio Courts have been of the view that, in construing constitutional provisions, narrow and technical definitions of particular

words and phrases should be disregarded. Hupp v. Hock-Hocking Oil & Natural Gas Co., 88 Ohio St. 61, 101 N.E. 1053 (1913); Chandler & Taylor Co. v. Southern Pacific Co., 104 Ohio St. 188, 135 N.E. 620 (1922)

The Ohio Supreme Court has previously interpreted the constitutional provision at issue in this case. A change in that interpretation, such as requested by petitioners, would radically limit the intention of the Ohio Constitution concerning absence of justices in the Ohio Supreme Court. Such a revolutionary change would clearly slow the wheels of justice whenever, and for whatever reason, two justices are absent. Under the petitioners' argument, if two Supreme Court justices had to disqualify themselves for reason of bias or interest, the case could never constitutionally be decided as only one member of the Supreme Court could be replaced. The impracticability of petitioners' construction is especially poignant in light of the presence of

adequately elected Court of Appeals justices who could substitute for absent supreme court justices. The obvious lack of Ohio case law on point to support the petitioners' argument further emphasizes the error in their rationale.

It is noteworthy that Article IV, Section 2 of the Ohio Constitution also provides that a majority of the Supreme Court is necessary to constitute a quorum and render a competent judgment. In this case, five of seven justices present during the oral argument were regularly elected justice of the Supreme Court, and a majority of those justices ruled against the petitioners. Clearly under the Ohio Constitution, a competent Supreme Court has decided the case and assuming, arguendo, that it was error to appoint two visiting judges, such error is harmless.

The petitioners' additional contention that the assignment of two judges violated their clients' rights to due process is also

in error. This argument is premised upon petitioners' narrow interpretation of the Ohio Constitution, Article IV, Section 2. The Ohio Constitution is the sole source of authority for judicial tribunals and it allows for the substitution of justices elected to the Ohio Supreme Court by judges from the state's courts of appeals. As stated in State v. Cook, supra, a tribunal of five justices and two substitute judges was considered a competent tribunal to decide the case and non-violative of the parties' due process rights. This view has been followed in several other jurisdictions, including Burchett v. Cardwell, 493 F.2d 492 (9th Cir. 1974) in which only three of the five justices of the State Supreme Court heard oral arguments. This was held not to have denied the defendant his rights of due process of law.

In Glidden Co. v. Zdanok, 370 U.S. 530 (1962), this Court held that a decision by a Court of Appeals in which a judge of the Court

of Claims was a substitute member of the panel is not vitiated under the due process clause by the participation of the substitute judge. The petitioners in the instant case are attempting to circumvent the rule forbidding challenges to the authority of the judge which is founded:

> "[U]pon an obviously sound policy of preventing litigants from abiding the outcome of a lawsuit and then overturning it, if adverse upon a technicality of which they were previously aware..." Glidden, 370 U.S. at 535

The tribunal of the Ohio Supreme Court was competent in the present case and satisfied the due process requirement. Referring to Frank v. Mangum, 237 U.S. 309 (1915), the Court of Appeals in Sas v. State of Maryland, 334 F.2d 506 (1964) stated:

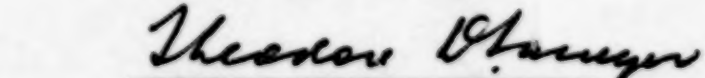
> "The Supreme Court has put it beyond the range of further debate that the 'due process' clause of the fourteenth amendment has not the effect of imposing upon the states any particular form or mode of procedure, so long as the essential rights of notice and a hearing, or opportunity to be heard,

> before a competent tribunal are not interfered with. (Emphasis supplied.) at p. 515

The Ohio Constitution, as amended in 1968, its predecessor, as amended in 1944, and Ohio case law all support the conclusion that a court which includes two substitute judges is a competent body and satisfies the requirements of due process of law.

For all of the foregoing reasons, the petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify, as a member of the Bar of this Court, that a true copy of the Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the United States was sent by regular U. S. mail, postage prepaid, to Walter J. Wolske, Jr., 580 South High Street, Suite 320, Columbus, Ohio 43215, attorney for petitioners, this 12th day of November, 1982.

Theodore D. Sawyer

THEODORE D. SAWYER

AFFIDAVIT OF MAILING PROCESS

STATE OF OHIO

COUNTY OF FRANKLIN, SS:

I, Theodore D. Sawyer, after first being duly sworn, deposes and states that to my knowledge, the Respondents' Brief in Opposition to the Petition for Writ of Certiorari to the Supreme Court of the State of Ohio was delivered by Airbourne Express and properly addressed to the Clerk of this Court on November 12, 1982 and that, therefore, this document should be deemed timely filed pursuant to Rule 28.2 of the United States Supreme Court Rules.

Theodore D. Sawyer

THEODORE D. SAWYER

SWORN TO BEFORE ME and subscribed in my presence this 12th day of November, 1982.

Julia S. Settimo

Notary Public

JULIA S. SETTIMO
NOTARY PUBLIC - STATE OF OHIO
MY COMMISSION EXPIRES AUG. 18, 1986